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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 215

JACOB STRAUCH, PETITIONER

v.

UNITED STATES OF AMERICA

ALEX STRAUCH, PETITIONER

v.

UNITED STATES OF AMERICA

HARRY BENJAMIN SHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Neither the *per curiam* order of the Court of Appeals affirming the judgments of the District Court (Pet. 21-22), nor the memorandum (Pet.

23-27) and dissenting opinion (Pet. 27-31) on the petition for rehearing has been reported.

JURISDICTION

The order of the Court of Appeals was entered April 21, 1954 (Pet. 21-22), and a petition for rehearing was denied on June 17, 1954 (Pet. 23-27). The petition for certiorari was filed on July 15, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37(b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether a statement of income, which had been submitted in an effort to settle civil tax liabilities, was admissible in a prosecution for invasion of income taxes.

2. Whether the trial court erred, as to petitioner Jacob Strauch, in denying a motion to strike evidence of increases in his net worth.

3. Whether, despite the absence of an objection, certain language of the trial court's charge to the jury, stating the maximum and minimum penalties under the statute and remarking that the Government could not appeal, constituted plain error requiring a reversal of the convictions.

STATUTE AND RULE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for any pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 145.)

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may as-

sign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

On April 2, 1951, a three count indictment was returned in the United States District Court for the Middle District of Tennessee against petitioner Jacob Strauch. (R. 5-7.) On the same day, indictments in two counts were returned against petitioners Alex Strauch and Harry Benjamin Sher. (R. 7-10.) These indictments charged Alex Strauch and Sher with attempts to defeat and evade their income taxes for the years 1944 and 1945, and Jacob Strauch with the same offense for the years 1944, 1945, and 1946, all in violation of Section 145 (b) of the Internal Revenue Code.

The amounts of net income and taxes due thereon, as reported in the returns and as corrected, were alleged to be as follows:

	Reported		Corrected	
	Income	Tax	Income	Tax
Jacob Strauch				
Count I (1944)	$ 9,478.94	$ 2,392.21	$32,012.76	$14,793.29
Count II (1945)	.....	.....	.....	25,471.71
Count III (1946)	16,922.27	4,905.30	35,000.36	14,986.47
Alex Strauch				
Count I (1944)	$ 5,298.50	$ 1,061.57	$25,158.30	$10,393.15
Count II (1945)	4,776.50	919.13	18,785.42	6,641.27
Harry Sher				
Count I (1944)	$ 2,727.69	$ 452.00	$19,760.79	$ 7,446.04
Count II (1945)	2,542.49	410.00	13,935.79	4,420.46

The case was tried from April 20 to April 29, 1953. (R. 72.) At the conclusion of all the evi-

dence the jury deliberated one hour and a half and found petitioners guilty on all counts. (R. 488.) Alex and Jacob Strauch were fined $5,000 and sentenced to three years imprisonment on each count, the sentences to run concurrently, while Sher was fined $5,000 and sentenced to four years imprisonment on each count, the sentences to run concurrently. (R. 493-494.) Petitioners' motion for a new trial was denied on June 19, 1953. (R. 538.) The Court of Appeals affirmed the decision. (R. 597-605.)

The evidence to support the verdict may be summarized as follows:

Petitioners were partners in a wholesale jewelry business during the period here involved. (R. 81-82, 90, 346-349.) Since they dealt largely in the black market a great proportion of their business was transacted in currency. (R. 102, 404, 417-418.) Sales were made to post exchanges and jewelry stores in the neighborhood of camps and, according to petitioners, the business was closed when this market dried up at the end of the war. (R. 348-350, 364, 372.) Records of purchases and sales were kept until November 7, 1945. After that, only purchases were recorded, the last entries being on August 19, 1946. (R. 88-93, 395-396.) No income tax returns were ever filed by the partnership. (R. 115.) Both Jacob Strauch and Alex Strauch also had individual jewelry businesses of their own (R. 221, 223, 227).

An examination of the books of the partnership revealed that the distributive shares of each part-

ner amounted to approximately $19,859 in 1944 and $14,000 in 1945. (R. 204-217.) When confronted with these figures from their own books, all three partners admitted that they had not reported any of this income, although Alex Strauch and Sher later stated that they had reported some of it. (R. 217.) Using the figures shown by the books the Government demonstrated that the following amounts of net taxable income had been omitted from the returns of Alex Strauch and Sher.[1] (R. 217-227):

	Alex Strauch	Sher
1944	$20,359.80	$17,033.10
1945	14,008.92	11,390.30

In addition to the unreported income appearing upon the face of the books, there was evidence of large distributions to the partners which either did not appear on the books or had been entered as expenditures. Thus, on January 9, 1945, three checks to cash were drawn in odd amounts but totaling exactly $30,000. They were not entered in the book recording expenditures, although according to the checks and the stubs they represented payments for merchandise which had been purchased by the partnership.[2] The checks were cashed by the partners. (R. 256-259, 400-404.)

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[1] As will be observed, by comparison with the figures in the indictment (*supra*, p. 4), the Government proved almost exactly the amounts alleged.

[2] Sher, who kept the books, testified that all purchases were recorded in the books. (R. 351, 417.)

There were other similar instances. (R. 389-400.)

There was further evidence as to petitioner Jacob Strauch who had been indicted for 1946, as well as 1944 and 1945. Jacob Strauch gave the agents very few of the records of his individual business, but he told them that all the deposits in his bank accounts represented receipts from his business. (R. 227-228, 266-267, 269-270, 272, 296-297, 300, 303-304.) The agents, therefore, subjected the bank deposits to a careful analysis, the results of which are not challenged in the present petition, and determined that Jacob Strauch had failed to report the following amounts of taxable net income.[3] (R. 229-232, 236-255; see particularly R. 251-255):

1944	$22,533.82
1945	49,018.91
1946	18,078.09

In addition, the Government made an effort to show increases in Jacob Strauch's net worth between 1940 and 1946. (R. 103-105, 161-163, 495-496.) Eventually, the Government had to abandon this method of proof when it could not properly account for the years 1940 and 1941. (R. 196-201, 325.) It was made clear to the jury by the discussion of the court and counsel and by cross-examination of a Government witness that the net worth computation would be unsatisfactory if the

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[3] Again, the figures coincide very closely with those alleged in the indictment. (*Supra*, p. 4.)

Government could not account for all the years involved, and counsel for the defense fully understood that this part of the Government's case had been abandoned. (R. 105, 111-115, 162-163, 199-200, 325, 549, 556-557.) Although a motion to strike the net worth evidence was made and denied after the direct examination of the last prosecution witness (R. 259-260), the motion was not renewed when the Government finally rested (R. 323-329) and there was no request by the defense that the court, in its charge, instruct the jury to disregard such evidence (R. 477-478, 488).

ARGUMENT

As must be obvious from the above Statement, the Government's main proof of unreported partnership income, and in fact its main proof in the case, was derived directly from the very figures recorded in the partnership books.[4] In addition evidence was presented from which it could be concluded that a $30,000 distribution of profits in 1945 had been entered in the books as expenditures.[5] (*Supra*, p. 6.) Petitioner Jacob Strauch's income from his own individual business was proved by an analysis of his bank deposits. (*Supra*, p. 7.) An effort to corroborate this by a computation of the increases in Jacob Strauch's net worth was not fully successful and was not pushed.

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[4] See R. 178-179, 199, 234, 259, 325, 556.

[5] Other instances of this nature, including the one of which petitioners complain (Pet. 5-6, 12), did not come into evidence until the cross-examination of petitioner Sher (R. 384-400).

(*Supra*, pp. 7-8.) Petitioners do not challenge the main proof against the partnership or the main proof against Jacob Strauch, but the petition gives the impression (Pet. 5-9, 11, 15) that the Government's subordinate methods of proof were all it had.

1. In December 1949, over three years after the revenue agents had begun their investigation,[6] petitioners' attorneys came to Washington in an attempt to effect a settlement of their civil tax liabilities. (R. 387-389.) They submitted a "Restatement of Partnership Income" for the period from 1943 to 1946, inclusive. (R. 496-498.) The document was signed by petitioners and contained the following language (R. 497):

> It is the opinion and belief of the undersigned that a *corrected statement of income* of the said partnership is *properly reflected* in the exhibit hereto attached, * * * and that taxable income of the undersigned should be *appropriately computed* as a result of the said restatement; * * *. [Emphasis supplied.]

One of the items was a distribution of profits on September 3, 1943, in the amount of $3,000. (R. 498.)

During cross-examination of petitioner Sher, the witness' attention was directed to an entry in the books showing a payment of $3,000 to the part-

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[6] The investigation was begun in September, 1946 (R. 99, 330, 331).

ners on September 3, 1943, as traveling expenses. Sher testified that the entry was correct, and he was then confronted with the statement submitted in Washington. (R. 384-393.) The defense duly objected, and petitioners now contend (Pet. 11-15) that the statement was an offer in compromise and that it was erroneously admitted in evidence.

The simple answer is that the statement was more than an offer in compromise. It was, as the prosecution argued to the trial judge, a confession or a statement of fact to support an offer in compromise. (R. 387, 393, 571-573.) It was a statement of what petitioners contended were the true facts, and it was submitted as an offer to pay what petitioners admitted was actually due.[7]

It is elementary that any rule excluding offers in compromise refers to the actual offer, and not to the admission in evidence of particular facts or circumstances. IV Wigmore, Evidence (3d ed., 1940, Sec. 1061(*c*); see also Section 1048(1)(b). The case upon which petitioners rely,[8] and which likewise was decided by the court below, is not relevant, for there the Government relied on the actual settlement of a civil case, not the admission of a fact as an incident to settlement negotiations. Furthermore, petitioners were well aware that a special agent had been working on the case for

[7] The statement of counsel (R. 387-388) upon which petitioners rely (Pet. 14) was not evidence. Regardless of the manner in which the statement was prepared, it was signed by petitioners as properly reflecting their true income. (R. 497.)

[8] *Ecklund* v. *United States*, 159 F. 2d 81.

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about two and a half years (R. 201-204), and their effort to make a payment at this late stage provided some evidence of an attempt to fend off criminal proceedings. Cf. *United States* v. *Stoehr*, 196 F. 2d 276, 282-283 (C. A. 3d), certiorari denied, 344 U. S. 826.

2. It is urged (Pet. 15-17) that the evidence as to the increase in Jacob Strauch's net worth should have been stricken. The trial court, holding that this evidence was a relevant and corroborative circumstance, refused to grant a motion to strike made at the end of the direct testimony of Agent Norris. (R. 259-260.) The motion was not thereafter renewed and no special instruction on the subject was requested. There is no merit in the present argument. Petitioners suffered no prejudice even if the ruling were erroneous.

Alex Strauch and Sher were obviously not affected by evidence of an increase in Jacob Strauch's net worth, and the record affirmatively demonstrates that he himself was not prejudiced thereby. The net worth evidence would at most have supported the Government's analysis of Jacob Strauch's bank deposits. It revealed an increase of approximately $84,000 in his net assets between May 1940 and November 1946 (R. 103-105, 163, 495), whereas the bank deposits analysis, the validity of which is unchallenged here, disclosed an even greater amount of unreported income for the 1944-1946 period alone (*supra*, p. 7). Moreover, it must have been clear to the jury, from the discussions between the court and counsel and the

cross-examination of Agent Simpson (*supra,* pp. 7-8), and from the failure of the Government to renew its abortive efforts to account for the years 1940 and 1941 (R. 197-201), that the net worth evidence was an insufficient basis, in itself, upon which to return a verdict of guilty. No specific charge was requested, but the jury was instructed at length on the general subject of circumstantial evidence. (R. 480-482.) Finally, it would appear that the prosecutor did not even mention the matter in argument to the jury, for the trial judge twice made the statement during proceedings on the new trial motion, without challenge by the defense, that the Government had abandoned the net worth theory. (R. 549, 557.)

Furthermore, the trial court's ruling was correct. As long as the Government's other evidence established a *prima facie* case, the jury could weigh the corroborative effect of the net worth increases, even though that alone would be an insufficient basis for conviction. This same issue is pending before this Court in No. 209, this Term, *Beaty* v. *United States,* on petition for a writ of certiorari, where the United States also opposed the granting of the writ. If petitioners had requested a limiting instruction it is quite clear that it would have been granted.[9] (R. 557.)

3. During the charge to the jury (R. 478-487)

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[9] The cases upon which petitioners rely (Pet. 16-17) are not in point since in all of them the Government was forced to rely almost entirely upon the net worth method to prove unreported income.

the trial judge, in explaining the offense alleged in the indictment, read the last portion of Section 145(b) (*supra*, pp. 2-3) including the penalty imposed. He told the jury that their duties ceased upon return of the verdict; that the case would end if they found petitioners not guilty since the Government could not appeal; and that it was the duty of the court to impose sentence if they returned a guilty verdict. He then explained the maximum and minimum sentences which he might in his discretion impose, but without in any way committing himself. (R. 485-486.) There was no objection (R. 488), and the matter was not even noticed until one of the circuit judges raised it during oral argument before the Court of Appeals (Pet. 27). Petitioners, adopting the argument of the dissenting judge below, now contend (Pet. 18-20) that this part of the charge constituted reversible error.

We submit that the mere statement of the allowable maximum and minimum penalties, buried in the context of the court's general charge and without any intimation of prospective severity or lenience, can have had no possible effect upon the jury's verdict. The cases upon which petitioners rely are readily distinguishable. In *Demetree* v. *United States*, 207 F. 2d 892, 895 (C. A. 5th), the jury, after informing the trial judge that they were deadlocked, received assurance that the punishment would be lenient. And in *Lovely* v. *United States*, 169 F. 2d 386, 391 (C. A. 4th), a rape case in which the jury were at liberty to impose capital

punishment, an instruction was given that the defendant would be eligible to parole in fifteen years if sentenced to life imprisonment.

The trial court's comment on the non-appealability of a not guilty verdict is not clearly prejudicial to the petitioner. But even if it be subjected to criticism, still it is not so manifestly erroneous as to call for a reversal. This is clearly a case which falls within the prohibition of Rule 30. (*Supra*, pp. 3-4.) As the Court of Appeals for the Seventh Circuit said recently in *United States* v. *Furlong*, 194 F. 2d 1, 3, certiorari denied, 343 U. S. 950:

> [Rule 30] is intended to prevent a litigant from taking advantage, after verdict, of the giving of an erroneous instruction to which he failed to call attention in time to afford the court an opportunity to correct it.

The "plain error" rule may not be invoked under such circumstances as those presented by the present record. See *Ryan* v. *United States*, 99 F. 2d 864, 865 (C. A. 8th), certiorari denied, 306 U. S. 635; *Goldstein* v. *United States*, 73 F. 2d 804, 806-807 (C. A. 9th).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
DAVID L. LUCE,
JOSEPH M. HOWARD,
DAVID R. URDAN,
Special Assistants to the Attorney General.

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